IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J. A., MWANGESI, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO 507 OF 2015

1. **CHUKWUDI DENIS OKECHUKWU .....1st APPELLANT**
2. **STAN HYCENT .....2nd APPELLANT**
3. **PAUL IKECHUKWU OBI ..... 3rd APPELLANT**
4. **SHOAIB MOHAMED AYAZ ..... 4th APPELLANT**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mruma, J.)

dated the 30th day of October, 2015

in

Criminal Sessions Case No. 26 of 2015

JUDGMENT OF THE COURT

23rd August & 27th September, 2018

MWANGESI, J.A.:

The appellants herein stood arraigned in the High Court of Tanzania at Dar es Salaam for the offence of Trafficking in Narcotic Drugs contrary to the provisions of section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act Cap. 95 R.E 2002. It was the case for the prosecution that, on the 4th day of March, 2011 at Kunduchi Mtongani area within Kinondoni District in Dar es Salaam Region, the appellants jointly trafficked in the United Republic of Tanzania 78,542.47 grams of narcotic

drugs namely, cocaine hydrochloride valued at Tanzanian Shillings Three Billion, One Hundred and Forty One Million, Six Hundred and Ninety Eight Thousand, and Eight Hundred only (3,141,698,800).

Upon all appellants protesting their innocence, the case went to full trial which was conducted with the aid of three assessors. In establishing the case against all appellants, the prosecution/Republic relied on the testimonies of eight witnesses and seven exhibits. On their part in defence, the appellants relied on their own sworn/affirmed testimonies, which were supplemented by four exhibits.

The brief facts of the case leading to the decision which is the subject of this appeal as could be gleaned from the evidence on record, start with the testimony of one Salim Rashid Hamduni (PW2), who briefly told the court that, on the 4th day of March, 2011, police officers comprising of himself (PW2), Inspector Sylivester Kennedy Siame (PW8), ASP Daniel Shillah and others, acting on information which he had received from an informer, arranged to arrest suspects who were alleged to be dealing with importation of narcotic drugs. The *locus in quo* was named to be at a house situated at Kunduchi Mtongani area within Kinondoni district.

At around 22:00 Hours, they pounced on the alleged house which was fenced by a wall. They surrounded it and knocked at the main gate. The occupants therein, did not open the gate even after they had introduced themselves to be police officers. Instead of opening the gate, there was an attempt by the appellants to escape and on the part of the first appellant, he even managed to jump over the fence, but they arrested him. The other appellants, were found inside the fence but outside the house also attempting to flee away. All of them were put under arrest. PW2 deposed further that, in the course of the fracas, two neighbours namely Kamaliza Saudara and Peter Moshi, went to the scene of the incident.

The police officers then informed the appellants that, they suspected some narcotic drugs to have been kept in that house and therefore, they wanted to mount a search. However, before conducting the search which was supervised by ASP Daniel Shilla, they called the ten cell leader of that area one Simon Asilia Porashi (PW3), who in the company of Kamaliza Saudara and Peter Moshi, witnessed the search. Therein, there were recovered 81 sachets of a substance believed to be narcotic drugs, which had been staffed in two draft sulphate bags (exhibit P1). A certificate of

seizure (exhibit P2) to that effect was prepared by ASP Shillah, and signed by all the appellants and the three witnesses who have been named above.

From Kunduchi Mtongani area the appellants and the suspected narcotic drugs were taken first to Kawe Police Station, where a case file was opened and then, to the Central Police Station of Dar es Slaam. In moving to the central police Station, the appellants boarded onto a motor vehicle make Toyota Land Cruiser, while the narcotic drugs, were carried in an Escudo make motor vehicle, and they travelled in a convoy.

At the Central Police Station, the appellants were remanded, whereas the drugs were sent to the Anti-Drugs Unit (ADU) for safe custody. At ADU, PW2 handed over the narcotic drugs (exhibit P1), to SP Neema Mwakagenda (PW5), who was the exhibits keeper. PW2 told the Court further that, the handing over was made at around 01: 00 Hours.

SP Neema Mwakagenda (PW5) informed the Court that, after she had received exhibit P1 from PW2, she recorded it in the register book and transferred the sealed sachets from the two draft sulphate bags into two boxes and sealed them with sello-tape. The reason for making the transfer according to the witness, was from the fact that the draft sulphate bags

could not get sealed. The sealed two boxes were thereafter preserved in the exhibit room.

PW 5 deposed further that, on the 8th day of March, 2011, she took the boxes containing the suspected narcotic drugs from the exhibit room and showed them to the appellants and the head of the ADU one SACP Godfrey Nzowa. Then, in the presence of all, she sealed the 81 sachets of narcotic drugs into the two boxes ready for taking them to the Government Chemist for analysis. On the following day which was the 9th March, 2011, PW5 sent the two sealed boxes (exhibit P1) to the Government Chemist where she handed it over to Ernest Lujuo Joseph Isack (PW1), who after making a corresponding entry in the register, in the company of PW5 sent it to one Bertha Fredrick Mamuya (PW4), for analysis.

PW4 informed the court that, upon receiving the two boxes (exhibit P1) from PW1, who was in the company of PW5, she unsealed it and therein, she found 81 sachets of substance which was in powder form. The first thing which she did was weighing the substance, which she found to be 78,542.47 grams. Thereafter, she took a sample from each of all the 81 sachets. The remaining sachets were returned in the original boxes, which were sealed and handed back to PW5 for safe custody.

The finding of PW4 after making analysis of the samples of the substance which she had taken as contained in the report which was tendered in evidence as exhibit P3, was to the effect that the substance contained in the 81 sachets was cocaine hydrochloride. The said finding of PW4 led to the arraignment of the appellants for the offence of trafficking in narcotic drugs, which is the basis of this appeal.

On their part in defence, even though all appellants did not dispute the fact that they were on the material date found in the house where the narcotic drugs were recovered and seized, they strongly denied involvement with the said narcotic drugs. The account by the first appellant was to the effect that, he was indeed the one staying in the house where the suspected narcotic drugs were recovered, and that, he had invited the fourth appellant to stay with him after having presented to him his predicament from when he arrived in the country from Pakistan, which is the country of his origin. He deposed further that, on the fateful date, he was arrested a short moment after his arrival at his home while in the company of the third appellant, who is his fellow Nigerian, and the second appellant (deceased), whom he had met in town and invited them at his house for a drink. He strongly disassociated himself from the bags

containing narcotic drugs, because they had been taken to his house and accepted by the fourth appellant, who had remained at his home, while he was absent.

The other appellants, adopted the version of the first appellant and in addition, the fourth appellant told the court that, on the material date, he had indeed remained back at home when the first appellant went to town for his religious business. He stated further that at about 21:00 Hours, a person who introduced himself by the name of Musa, arrived at their house in a motor vehicle and handed over to him, the two travelling bags which were later found to contain the suspected narcotic drugs, with instructions that, he had to hand them over to the first appellant. Thereafter, in no time after the first appellant and his guests had arrived, policemen arrived and arrested them. He also disassociated himself from the two travelling bags arguing that, he was just asked to receive and hand them over to the first appellant.

As hinted earlier, during the trial of the appellants, the learned judge was assisted by three assessors. Upon evaluating the evidence placed before them, while the assessors were of the unanimous view that, the prosecution evidence had failed to satisfactorily establish the commission

of the offence by all appellants, the learned judge on his part, was left with no shadow of doubt that, the evidence from the prosecution witnesses, had established the guilt of all appellants to the hilt and hence, convicted all of them as charged. Consequently, each appellant was sentenced to imprisonment for a term of thirty years.

The appellants felt aggrieved by the decision of the trial court and have appealed to this Court challenging the findings of the learned trial judge. Nonetheless, before the second appellant could prosecute his appeal, it was reported to the Court that he was no more as verified by the death certificate with Number C No. 10000168879 dated the 2nd day of December, 2017, which was presented before us. With such proof, we marked the appeal by the second appellant to have abated in terms of the provisions of Rule 78 (2) of the Court of Appeal Rules, 2009 **(the Rules)**, and thereby, proceeded with the appeals of the three surviving appellants.

The first and fourth appellants, filed a joint amended memorandum of appeal which was lodged on the 16th August, 2018, comprising of nine grounds namely, **one**, that the learned trial judge erred in finding that the appellants herein were guilty of the offence of trafficking in narcotic drugs; **two,** that the offence was not proved to the required standard and that,

the burden of proof was shifted to the appellants; **three**, that the learned trial judge erred in relying on the theory of chain of circumstantial evidence in convicting the appellants; **four**, that the trial judge erred in convicting the appellants basing on exhibit P1 despite its being mishandled by the prosecution; **five**, that the learned trial judge erred in relying on exhibit P5 whose evidential value was questionable; **six,** that the learned trial judge erred in relying on contradicting testimonies and statements of PW1, PW3, and PW6. **seven,** that exhibit P7 was not properly tendered during trial; **eight**, that the learned trial judge erred in disregarding the opinions of assessors without giving reasons; and **nine,** that the learned trial judge erred in relying on exhibit P6, which was not properly recorded and tendered in court.

On his part, the third appellant lodged his memorandum of appeal which was presented to the Court without objection from the other parties at the hearing date. The same was constituted of thirteen grounds. However, upon close scrutiny of the said grounds of appeal, we have noted that they squarely tally with the joint grounds of appeal by his colleagues in the following order, his grounds number 1, 10 and 11 resemble ground number 3 of his colleagues, grounds number 2, 3 and 4, correspond with

ground number 4, ground number 5 matches ground number 7, grounds number 6, 8 and 12 correlate with ground number 5, ground number 7 relates to ground number 6 and ground number 11 tallies with ground number 8. Ground number 9 of the third appellant was abandoned in that, he did not argue it in Court. In that regard, the two sets of grounds of appeal by the appellants will be considered together.

On the date when the appeal was called on for hearing, Mr. Jamhuri Johnson learned counsel, represented the first and fourth appellants, whereas the third appellant appeared in person legally unrepresented and hence, fended for himself. On the part of the respondent/Republic, it was ably represented by Mr. Timon Vitalis, learned Principal State Attorney.

In the oral submission to expound the grounds of appeal before us, Mr. Johnson argued together grounds 1, 2, 3, 4 and 6 all of which, are in respect of the probative value of the evidence that was relied upon by the learned trial judge to hold the appellants culpable for the charged offence. The crux of the complaint by the appellants is basically twofold, **firstly,** that the evidence of the prosecution witnesses was full of discrepancies and inconsistencies, and **secondly**, that the chain of custody of the narcotic drugs allegedly found in possession of the appellants and

examined by the Government Chemist to be narcotic hydrochloride, was not established.

Arguing on the discrepancies and inconsistencies of the evidence, the learned counsel pointed out that, there was inconsistency between the testimonies of PW2 and PW8 in regard to the police station where the appellants were sent after the arrest. While PW8 stated that they were taken to Wazo Police Station, the other witness that is, PW2 told the court that, they were sent to Kawe. The learned counsel further argued that, the testimonies of the two witnesses did also contradict in regard to the status of the two bags containing the drugs when they were being sent to the ADU. While PW8 said they were sealed, PW2 did state that, they were just left loose. He doubted the credibility of the two witnesses, and invited us to do the same.

The other discrepancy pointed out by the learned counsel was in regard to the testimonies of PW3 and PW6. While PW3 told the trial court on oath that, he was the ten cell leader of the area where the first appellant was residing and hence, the place where the narcotic drugs were recovered and seized, the said contention contradicted with the testimony of PW6, who named the ten cell leader of that area to be one Bi Raha. We

were again urged by Mr. Johnson to doubt the credibility of the two witnesses and do away with their testimonies.

Mr. Johnson did as well challenge the learned trial judge in holding the appellants culpable for the charged offence, basing on what he termed the three principles of chain of circumstantial evidence, as found at pages 248 to 251 of the record of appeal. It was his submission that, the learned judge erred in holding that the appellants failed to establish the purpose of their entering into the country, and further that, they failed to establish on how they came to know each other, and lastly, that they failed to explain as to how they came to be found in one house. In so holding according to the learned counsel, the judge shifted the burden of proof from the prosecution to the appellants, which was against the cherished principle in criminal trials, that the burden never shifts to the accused. To back up his stance, he referred us to the decision of the High Court in **Fanuel Kiula Vs Republic** [1967] HCD No. 369.

With regard to the discrepancy on the chain of custody of the drugs allegedly recovered from the house where the first and fourth appellants were residing, the learned counsel submitted that, it was not established to the required standard from when exhibit P1 was seized at Kunduchi

Mtongani, to when it was tendered in court as exhibit during trial. He gave an example of the way the appellants and the exhibits were ferried from Kawe Police Station to the Central Police Station in which, according to the testimony of PW2, the appellants were put in a Land Cruiser, whereas the narcotic drugs were put in an Escudo. That apart, the evidence revealed that, the dates in which the drugs were seized, and when they were handed over to the exhibits keeper, are different. Under the circumstances, the possibility that there might have been some tampering with the exhibits in between, could not be overruled.

Relying on the previous decisions of this Court in the cases of **Abuhi Omari Abdalla and Others vs Republic**, Criminal Appeal No. 28 of 2010 (unreported) and **DPP Vs Shiraz Mohamed Shariff** [2006] TLR 427, Mr. Johnson, emphatically submitted that, it could not be asserted with precision that, what was tendered in court and admitted as exhibit P1, was exactly the substance which was recovered at the house where the appellants were found on the fateful date. He therefore, implored us to find merit in these grounds of appeal.

On his part, the third appellant had nothing substantial to submit in amplification of his grounds of appeal. He just requested the Court to

adopt his grounds of appeal wholesome as they appear in the record of appeal, and invite the respondent to respond to them, reserving his right of rejoinder as the need could demand.

In rebuttal, the learned Principal State Attorney, submitted that there was no shifting of the burden of proof to the appellants, when the learned trial judge, talked about the principle of the three chain of circumstantial evidence. What the trial judge did in mentioning them, was in the course of giving reasons for his findings, by showing how the testimonies of the appellants, had failed to cast doubt on the prosecution's case. Additionally, the three chain of evidence of circumstantial evidence, established on how the appellants were not innocent occupants of the house from where the narcotic drugs were seized. Mr. Vitalis, thus concluded his submission on this part, by arguing that the appellants were not convicted on the weakness of their defences, but on the strength of the prosecution evidence.

Regarding the alleged contradictions between the testimonies of PW3 and PW6, Mr. Vitalis argued that, there was no material contradiction in that, the essence of their testimonies, was to the effect that the first and fourth respondents, were residents of the house where the narcotic drugs

were recovered. The same was the case in regard to the alleged contradiction between the testimonies of PW2 and PW8 as regards the name of the police station where the appellants were taken after arrest. He argued that, the two names of the police stations mentioned by the two witnesses, meant the same thing as they were both referring to one police station. In any event, it was the argument of the learned Principal State Attorney that, the said discrepancy if any, was trivial as it did not go to the substance of the case which was facing the appellants, of being found with narcotic drugs.

On the question of the chain of custody of the narcotic drugs from when they were seized to their being tendered in evidence during the trial of the appellants, the learned Principal State Attorney submitted that, while the seizure was made on the 4th March, 2011, the process of moving with them and the appellants until when they were handed over to the exhibits keeper, did overlap the day whereby, the handing over was made on the 5th March, 2011. Under the circumstances, the complaint that it took a long time from when the drugs were seized to when they were handed over to the exhibits keeper is baseless. After all, there was evidence of PW2 as reflected at page 47 of the record of appeal that, from the time when the

narcotic drugs were seized, to when they were handed over to the exhibits keeper, they had remained in his custody.

Responding to the complaint by the appellants that, different motor vehicles were used to ferry the appellants and the exhibits, Mr. Vitalis dismissed the complaint by arguing that, there is no law which directs that, wherever there are suspects and exhibits, they have to be kept in one motor vehicle. Since the movement from Kawe Police Station, to the Central Police Station, was in a convoy of motor vehicles whereby, one carried the appellants and the other one carried the seized narcotic drugs, he wondered as to what was the basis of the complaint by the appellants.

The fact that exhibit P1 was recovered at the premises of the first appellant in the presence of all appellants, and that, from there it was taken to the exhibits keeper (PW5), who then sealed before taking it to the Government Chemist as acknowledged by the testimony of the first appellant at page 139 of the record of appeal, there was no way in which the chain of custody could be queried. The learned Principal State Attorney urged us to dismiss these grounds of appeal for want of merit.

In rejoinder, the learned counsel reiterated the points which he had earlier on, made in the submission in chief. On his part, the third appellant argued that, there was no evidence which was led by the prosecution, to positively implicate him to the charged offence. His being charged in connection to this case, was basically made for the reason that, he was found in the house where the narcotic drugs were recovered. He claimed to have just been an innocent invitee, who had nothing to do with recovered narcotic drugs.

The third appellant further submitted in rejoinder that, the evidence that was relied upon by the learned trial judge to hold him culpable for the charged offence, was full of discrepancies giving the example of the testimonies of PW2, PW3 and PW8, all of which alleged to have been at the scene of the incident. To buttress his submission, he referred us to the decision of the Court in **Evarist Nyongo Vs Republic**, Criminal Appeal No. 72 of 2010 (unreported). He thus pressed us to allow his appeal.

From the rival arguments above, there are in essence two issues which stand for our deliberation and determination, **firstly,** whether or not the discrepancies and inconsistencies which have been pointed out by the appellants were fatal. **Secondly**, whether the chain of custody of the

narcotics drugs which were seized from the appellants was sufficiently established.

Upon having earnestly considered the testimonies of Salim Rashid Hamduni (PW2), Simoni Asilia Porashi (PW3) and Inspector Sylivester Kennedy Siame (PW8), we are left with no doubt that, exhibit P1 that constituted two draft sulphate bags containing 81 sachets of substance suspected to be narcotic drugs, were recovered and seized from the house wherein, all the appellants were found at the particular time of their arrest.

While we are in agreement with the contention by the learned counsel for the first and fourth appellants, as well as the third appellant that, there were some contradictions in the testimonies of PW3 and PW6, as regards the proper ten cell leader of the area where the drugs were recovered, as well as the testimonies of PW2 and PW8, in respect of the police station, where the appellants and the seized narcotic drugs were taken from the scene of crime, in our view the discrepancies were inconsequential, as they did not go to the root of the case. The actual point which was made by the testimonies of the witnesses on that aspect, was to the fact that, the substance believed to be narcotic drugs, was recovered in the house where the first appellant and his co-appellants were found on

the material night, and that after being seized, they were sent to the police station together with the appellants.

It has been the practice of the Court when considering the question of discrepancies and inconsistencies of evidence, to look at serious discrepancies and consider them in wholesome. The court does not pick out some few sentences and consider them in isolation from the rest of the evidence. See: **Mohamed Said Matula Vs Republic** [1995] TLR 3, **Said Ally Vs Republic,** Criminal Appeal No. 249 of 2008, **George Maili Kamboge Vs Republic** Criminal Appeal No. 327 of 2013 and **Dickison Elia Nsamba Shapwata and Another Vs Republic**, Criminal Appeal No. 92 of 2007 (all unreported).

In **Dickson Elia Nsamba Shapwata** (supra), we relied on the works of the learned authors of Sarkar, The Law of Evidence 10th Edition, 2007 at page 48 thus:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a*

witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case material discrepancies do."

It is apparent from the words of the learned authors above that, it is inevitable to find people who have eye-witnessed the occurrence of one incident, giving contradicting accounts of its occurrence. And, with lapse of time, the gap of contradiction may even widen. What is pertinent therefore, is to look at serious contradictions which go to the root of the matter as we held in **Said Ally Vs Republic** (supra) that:

"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."

In view of the evidence on record, and the guiding principles of law as contained in the above named authorities, we are settled in our mind that, the contradictions or discrepancies which were pointed out by the appellants to the testimonies of the named prosecution witnesses that is,

PW2 *vis a vis* PW8, and PW3 *vis a vis* PW6, were trifling. The situation is distinguishable from the discrepancies which were found in the case of **Evarist Nyongo** (supra), which was cited by the third appellant in reliance, because, in that case the contradictions were serious, and that is why we held them to be fatal. To that end, it is our finding that, the contradictions in the instant case failed to shaken the prosecution case.

And, as regards the contention by the third appellant that, he was just an innocent invitee of the first appellant and that, he had nothing to do with the narcotic drugs which were recovered in the house of the first appellant on the material night, we are reluctant to accept that defence. This is from the fact that, there was the testimonies of PW2 and PW8, which was not resisted by the third appellant that, upon the police officers surrounding the house where the drugs were recovered, there was an attempt by the appellant and his colleagues to escape. One would pose a question as to why, if he was a mere an innocent invitee, the third appellant attempted to escape? The only probable inference for the attempt to escape, was because he knew well what was going on therein. Under the circumstance, we answer the first issue which was posed above in the negative.

We now turn to the second issue, which is in respect of the chain of custody of exhibit P1. Indeed, as it was submitted by the learned counsel for the appellants, for an exhibit let alone narcotic drugs, to be relied upon by the court to found conviction against an accused, its chain of custody from the time of its seizure to when it is tendered in Court as exhibit, has to be satisfactorily established. The rationale is not farfetched, it includes, **one,** to ensure the integrity of the chain of custody to eliminate the possibility of the exhibit being tampered with. **Two**, to establish that, the alleged evidence is in fact related to the alleged crime in which it is being tendered, rather than for instance having been planted fraudulently to make someone guilty. See: **Paulo Maduka and Others Vs Republic**, Criminal Appeal No. 110 of 2007, **Swahibu Ally Bakari Vs Republic,** Criminal Appeal No. 309 of 2010 and **Paschal Maganga and Another Vs Republic**, Criminal Appeal No. 268 of 2016 (all unreported).

What we had to ask ourselves in as far as the matter at hand is concerned, is whether or not, the chain of custody of the narcotic drugs in this case, was established to the required standard. As it has been held above, there was no dispute to the fact that 81 sachets of narcotic drugs, were recovered and seized from the house occupied by the appellants at

Kunduchi Mtongani. The arrest of the appellants and the seizure of the substance, was made by a team of police officers among whom was Salum Rashid Hamduni (PW2) as per the certificate of seizure (exhibit P2). PW2 informed the Court at page 47 of the record of appeal that, from when the narcotic drugs were seized, they remained in his control until when he handed them over to the exhibits keeper one SP Neema Mwakagenda (PW5), after midnight on the 5th day of March, 2011.

On her part, PW5 testified that, after she had received exhibit P1 from PW2, she recorded in the register and kept it in the exhibit room. The witness testified further that, before she could send the exhibit to the Government Chemist for analysis, on the 8th March, 2011, she took the exhibit from the exhibit room and showed it to the appellants and her boss, before she sealed it, a fact which was acknowledged by the first appellant at page 123 of the record of appeal.

In the light of the testimonies of the witnesses highlighted above, we are sufficiently convinced to hold that, the account by the prosecution witnesses was plausible. We are reluctant to accept the contention by the learned counsel on behalf of the appellants that, because the seized narcotic drugs were ferried in a different motor vehicle from the one which

carried the appellants, then there was a possibility for the narcotic drugs to be tampered with. This is so from the fact that, the movement of both the appellants and the exhibits from Kawe Police Station, to the Central Police Station, according to the testimonies of PW2 and PW8, was in a convoy. Under the circumstances, the possibility for tampering with the exhibits could not arise.

After going through the authorities which were relied upon by the appellants in their appeal, we are of the decided view that, they are distinguishable as we hereby explain. Starting with our decision in the case of **Shiraz Mohamed Shariff** (supra), where the exhibit in question was also illicit drugs, in our considered opinion, the circumstances of the two cases are different. In the earlier case, we held that the chain of custody of the drugs had not been established, after the prosecution had failed to account for a period of about five days, from when they had been seized, to when they were send to the Government Chemist for analysis. Our judgment read in part that:

> "*The fact that the seized drugs were, for about five days not accounted for and no explanation was given by the prosecution*

witness is not a minor irregularity and, therefore, the case was not proved beyond reasonable doubt."

What transpired in the case of **Shiraz Mohamed Shariff** (supra), was not the case in the instant matter, where the whole process of transmission of the exhibit from the point of its seizure to the time of being tendered in evidence, was clearly explained.

In **Abuhi Omari Abdalla and Others** (supra), the exhibit in question was also illicit drugs, which were in a form of pellets allegedly seized from the appellants. After examination by the Government Chemist, they were found to be Heroine Hydrochloride and had been tendered as exhibits P16, P17 and P18 during trial at the high court. We held that the chain of custody had not been established, because the link between the exhibits and the appellants had not been established. This was because DC Hamisi, SSP Kenyela and SSP Linus, who were alleged to have handled the exhibits from when they were found on the appellants, to when they were taken to the Government Chemist, for no apparent reasons were not called by the prosecution to testify before the Court on the circumstances under which the appellants were found with the exhibits. In our judgment we referred to our previous decision in **Moses Muhagama Laurence Vs**

the **Government of Zanzibar**, Criminal Appeal No. 17 of 2002 (unreported), where it had been held that:

> *"There is need therefore to follow carefully the handling of what was seized from the appellant up to the time of analysis by the Government Chemist of what was believed to have been found on the appellant...*
>
> *We think the vital missing link in the handling of the samples from the time they were taken to the police station to the time of chemical analysis has created a real doubt if the prosecution proved its case against the appellants to the required standard."*

On the contrary, the narcotic drugs involved in the instant case that is, exhibit P1, its handling from the time of its seizure at Kunduchi Mtongani, to the exhibit room at the ADU, and later to the Government Chemist, was well articulated by PW1, PW2, PW4 and PW5 and thereby, leaving no shadow of doubt that, the substance that was seized, is the very one which was examined by the Government Chemist and tendered in evidence.

On the basis of what we have endeavoured to highlight above, we are left with no flicker of doubt in our mind that, the narcotic drugs which were impounded and seized at Kunduchi Mtongani on the 4th day of March, 2011, from the house where the appellants were also found in, are the ones and the same, which were examined by PW4 and admitted in evidence as exhibit P1 on the 8th October, 2015. And further that, the same are cocaine hydrochloride as verified in the report of the Government Chemist (exhibit P3), which was prepared by PW4. To that end, we answer the second issue posed above in the affirmative that, the chain of custody of the seized narcotic drugs, was established to the required standard.

The complaint by the appellants in the seventh ground of appeal is on the procedure under which exhibit P7, a statement of ASP Shilla, was admitted in evidence. This statement was admitted under the provisions of section 34 B (2) of the Law of Evidence Act, Cap 6 R.E 2002 (**TEA**), after the witness had failed to appear in Court and give his direct oral evidence on account of being sick. The gravamen of the complaint by the appellants is founded on the provisions of law in which it was tendered. It was the argument on behalf of the appellants that, there was no compliance with the requirement of law. In view of the learned counsel for the appellants,

they ought to have been served with a notice of ten days, before the prosecution could be permitted to tender it, pursuant to section 34 B (2) (e) of **TEA**, a thing which was not done.

The response by the learned Principal State Attorney, to this ground of appeal was to the effect that, it was misconceived and unfounded. Mr. Vitalis submitted that, a requirement of notice of ten days is applicable only where there has been a request to that effect. Since in the instant matter, when the prosecution prayed to tender the statement as an exhibit, there was no objection from the appellants, then the issue of notice could not arise. He thus urged us to dismiss this ground of appeal as it is unfounded.

The provision of section 34 B (2) (e) of **TEA,** under which the ground of appeal has been pegged bears the following wording:

> *"34 B (1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be a witness, shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evince.*
>
> *(2) A written stamen may only be admissible under this section-*

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the opposing parties or objecting to the statement being so tendered in evidence. "

To be in a better perspective of appreciating as to whether or not, there was infringement of the provisions of section 34 B (2) (e) of the **TEA** as complained by the appellants, we hereby reproduce verbatim what transpired in Court as reflected at pages 111 to 112 of the record of appeal. The proceedings read:

*"**Vitalis PSA:** This case is coming for continuation of hearing of the prosecution's case. We expected one last witness ASP Daniel Shilla. Unfortunately, he is seriously sick and is unable to attend this Court. We don't think if he can recover in the nearest future. In the circumstances and in order to expedite this case, we have filed a notice under section 34B of the Evidence Act Cap 6 R.E 2002. The notice together with the statement of the witness have been served on the defence as required by the law. We now have two prayers to make.*

1. We pray that the statement of ASP Shilla be admitted in evidence as per section 34 B.

2. *That in view of the said statement, now prosecution exhibits which were received for identification purposes that is P ID 1 – PI D 3 be admitted as exhibits. That is all.*

Jamhuri Johnson: *for the first accused -* ***We have no objection*** to both prayers.

Karoli Mluge: *for the 2nd and 3rd accused –* ***We have no objection.***

Bryson Shayo: *for the 4th accused –* ***We have no objection.***

In view of the fact that, there was no objection to the prayer by the learned Principal State Attorney, the learned trial judge admitted the statement and other corresponding materials as exhibit P7 collectively.

As apparently shown by the bolded answers from the learned counsel, who represented the appellants above, there was no objection raised to the leave that was sought by the learned Principal State Attorney, to tender the statement of the witness who was unable to attend in Court and give his direct oral evidence. Our understanding of the provisions of section 34 B (2) (e) of **TEA** is that, the one who had the duty to lodge a notice or raise an objection to the admission of the statement of ASP Shilla, were the appellants. Since the record is clear that, they neither raised an

objection to its admission, nor prayed for leave to lodge a notice, they cannot now be heard to complain that, the statement and the corresponding materials, were admitted irregularly without due notice. In that regard, we find this ground of appeal by the appellants to be baseless. We hereby dismiss it.

In the eighth ground of appeal, the appellants challenged the failure by learned trial judge to give reasons as to why he differed with the opinions of the gentleman and lady assessors. It was argued on behalf of the appellants that, it is a requirement of law that, in a trial with the aid of assessors, where the judge differs with the opinion of assessors, he has to give reasons. In the view of the learned counsel for the appellants, the learned judge in the instant case, failed to do so and thereby, contravening the requirement of law.

On the other hand, Mr. Vitalis was at one with his learned friend that, indeed the trial judge was obligated to give reasons after differing with the opinion of assessors. He however, hastened to add that, the requirement was complied with by the learned trial judge. In his view, the problem with his learned friend, was attributed by the style which the learned trial judge, used in expressing the basis of his difference with the assessors. He

argued that, the learned judge in this case, started to give the reasons first before coming to the conclusion that, he differed with the assessors. As there is no hard and fast rule, on how the Judge has to express himself on how he differs with the opinion of the assessors, the learned Principal State Attorney, urged us to dismiss this ground of appeal because it is wanting in merit.

The question which stood for our determination in this ground of appeal is whether or not, the learned trial judge gave reasons as to why he differed with the unanimous opinion of the assessors. The unanimous opinion of the assessors which was given in regard to the evidence that was tendered to establish the guilt of all appellants, was to the effect that the evidence from the prosecution witnesses, had failed to establish the case against all appellants. As reflected at pages 194 and 195 of the record of appeal, the brief opinion of each was to the effect that, Zeti Salum, 1st assessor – "the prosecution evidence is contradictory in particular the testimonies of PW2, PW5, PW6 and PW3". Fatuma Musa, 2nd assessor – "the accused are not guilty". Bakari Kawesa, 3rd assessor – "the prosecution evidence is weak".

What we noted in the judgment of the learned trial judge is that, first, he analyzed the entire evidence from both sides and then, came out with a finding that, the evidence from the prosecution witnesses had sufficiently established the commission of the offence by all appellants beyond reasonable doubt. He further gave reasons as to why he found the defence evidence, to have failed to shake the evidence from the prosecution witnesses. And with such finding, the learned trial judge concluded by stating that:

> *"With due respect to the honourable assessors, I beg to differ with them. On my part I find the prosecution side has proved its case beyond reasonable doubt against all accused persons on the offence charged. Accordingly, I find that Ikechukwu Denis Obi, Stan Hycent, Paul Ikechukwu Obi and Shoaib Mohamed Ayaz are guilty of the offence of Trafficking in Narcotic Drugs contrary to section 16)1) (b) (i) of the Drugs and Prevention of Illicit traffic in Drugs Cap 95 of 2009 and hereby convict them of the charged offence."*

From what we gathered in the judgment of the learned trial judge after close scrutiny, we are inclined to side with the learned Principal State Attorney that, in the course of analyzing the evidence of both the

prosecution witnesses and the defence witnesses, the judge gave reasons as to why he believed some of the evidence and rejected the other. In that way, he gave reasons as to why the evidence which had been believed by the assessors to be reliable was not, and in the same vein, why the evidence which they thought was weak or contradicting, was merely inconsequential and therefore not fatal. We therefore, hold that, this ground of appeal is without merit and it is dismissed.

The value of the narcotic drugs allegedly found in possession of the appellants, of which its certificate of value was tendered in evidence by Christopher Shekiondo (PW7), as exhibit P5, constituted the fifth ground of the appeal. The argument advanced on behalf of the appellants was that, since the said value of the narcotic drugs was prepared for the purpose of determining the application of bail by the appellants, the learned trial judge, erred in using it to determine the sentence for the appellants after convicting them of the charged offence.

Mr. Vitalis on the other hand, discredited the contention by his learned friend arguing that, the certificate of value of the seized illicit drugs, which was admitted in evidence as exhibit P5, served both purposes that is, the bail application for the appellants, as well as the determination

of their sentence after conviction. The fact that the value of the recovered narcotic drugs had no dispute, it had nothing to do with the guilt or innocence of the appellants. We were thus implored by the learned Principal State Attorney, to find no merit in this ground of appeal and as a result, we be pleased to dismiss it and the entire appeal by upholding both the findings of learned trial judge and the sentence that was meted to the appellants.

Our task on this last ground of appeal is whether or not, there was any error occasioned by the learned trial judge, when he used the value of the narcotic drugs which was assessed during consideration of bail to the appellants, in assessing the appropriate sentence to the appellants after conviction. The provisions under which the appellants stood charged with and convicted of plus the sentence, that is, section 16 (1) (b) (i) of the Trafficking in Narcotic Drugs is couched in these words:

> *"16 (1) Any person who –*
>
> *(b) traffics in narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance commits an offence and upon conviction is liable –*

(i) in respect of narcotic drug or psychotropic substance to fine of ten million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and in addition to imprisonment for life, but shall not in every case be less than twenty years."

What was evident from Mr. Johnson's stance, is the fact that he did not dispute the value of the narcotic drugs allegedly found in possession of the appellants as assessed during determination of their bail applications. His argument in respect of this ground of appeal was to the effect that, such value ought not to have been used by the judge in assessing the sentence. Implicitly, Mr. Johnson was suggesting that, upon finding that the appellants were guilty to the charged offence, the learned trial judge ought to have called for a fresh assessment of the value of the narcotic drugs, for the purpose of using that value, to assess the proper sentence for the appellants in terms of the provision quoted above. We are not on our part, prepared to purchase that line of argument by the learned counsel because we think, it is misleading. The value of the narcotic drugs assessed in the first instance, was intended to serve both purposes at one and the same time. We therefore find this ground of appeal to be also without merit and we dismiss it.

That said and done, we hold that the entire appeal by the appellants is wanting in merit. It is accordingly dismissed. The finding of the trial judge is upheld and the sentences confirmed.

Order accordingly.

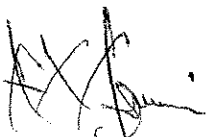
DATED at **DAR ES SALAAM** this 17th day of September, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL